8929

No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF MADISON COUNTY, NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

S. JOHN CAMPANIE
County Attorney
Madison County
North Court Street
P.O. Box 635
Wampsville, NY 13163

JEFFREY B. MORRIS
Counsel of Record
TOURO LAW SCHOOL
300 Nassau Road
Huntington, NY 11743
(718) 428-3507

MICHEL J. DEBOTTIS
Madison County
Solid Waste and Recycling
Committee Chairman
230 Main Street
Oneida, NY 13421

Counsel for Amicus Curiae

205274

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
THE PRE-CONSTITUTION ERA	4
FROM THE ERA OF THE CONSTITUTIONAL CONVENTION TO THE FIRST CHOLERA EPIDEMIC (1787-1832)	6
FROM THE FIRST CHOLERA EPIDEMIC TO THE END OF THE AMERICAN CIVIL WAR (1832-65)	9
FROM THE LAST CHOLERA EPIDEMIC TO THE BEGINNING OF THE "GOLDEN AGE OF PUBLIC HEALTH" (1866-1894)	11
FROM NEW YORK CITY'S REFORMS TO THE NEW DEAL (1895-1932)	15
FROM THE NEW DEAL ERA TO THE CREATION OF THE ENVIRONMENTAL PROTECTION AGENCY (1933-70)	19
THE ERA OF GREAT ENVIRONMENTAL CONCERNS (1970-to date)	22
CONCLUSION	27

TABLE OF CITED AUTHORITIES

Page

CASES

Clason v. Indiana,
306 U.S. 439 (1939) 20

Parker v. Brown,
317 U.S. 341 (1943) 20

United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority,
261 F3d 245 (2d Cir. 2001) 3

FEDERAL STATUTES

Comprehensive Environmental Response, Compensation and Recovery Act
42 U.S.C. § 9601 *et seq.* 24

Resource Conservation and Recovery Act,
42 U.S.C. § 6901, *et seq.* 22

42 U.S.C. § 6943 22

42 U.S.C. § 6945 23

STATE STATUTES

NYS General Municipal Law Section 120-ww 24

NY Solid Waste Management Act of 1988, c.70 Codified as amended in scattered sections of Article 27 of N.Y. Environmental Law 25

Cited Authorities

Page

MISCELLANEOUS

Beth, Loren P, *The Development of the American Constitution 1877-1917* (1971) 13, 14

Bureau of the Census, U.S. Department of Commerce, *Historical Statistics of the United States, Colonial Times to 1970* Part 2 (1975) 9

Burrows, Edwin G. & Mike Wallace, *Gotham A History of New York City: A History of New York* City to 1898 (1999) 8, 10, 16

Blumberg, Louis & Robert Gottlieb, *War on Waste* (1989) 14, 17, 19, 20, 21

Duffy, John, *The Sanitarians: A History of American Public Health* (1990) ..... *passim*

Goodnow, Frank J., *City Government in the United States* (1904) 16

Griffith, Ernest S., *A History of American City Government: The Conspicuous Failure, 1870-1900*, (University Press of America 1983) (1938) 7, 11, 13, 15, 16

Griffith, Ernest S., *A History of American City Government: The Progressive Years, and Their Aftermath* 192ff (University Press of America 1983) (1974) 10

Cited Authorities

Page

Griffith, Ernest S. & Charles R. Adrian, *A History of American City Government: The Formation of Traditions*, 1775-1870 (University Press of America 1983) (1976) 8, 9, 10

Melosi, Martin V., *Garbage in the Cities: Refuse, Reform and the Environment, 1880-1980* (Texas A&M University Press 1981)[1] 3, 6, 7, 13, 14, 17

Melosi, Martin V., *Garbage in the Cities: Refuse, Reform and the Environment* (rev. ed. University of Pittsburgh Press 2005) (1981) 4

Miller, Benjamin, *Fat of the Land: Garbage in New York The Last 200 Years* (2000) 9

Morris, Richard B. & Jeffrey B. Morris, *Encyclopedia of American History* (7th ed. 1996) 5

Morse, William Francis, *The Collection and Disposal of Municipal Waste* (1908) 14

Rosenberg, Charles E., *The Cholera Years* (rev.ed. 1987) (1962) 10, 13

Savas, E.S., *The Organization and Efficiency of Solid Waste Collection* (1977) 5, 7, 14

Peter T. White, *The Fascinating World of Trash*, 163Nat'l Geographic, April 1983, at 424, 456 ... 18

1. All references are to this edition unless otherwise noted.

Cited Authorities

Page

Winslow, C.F.A., *The Evolution and Significance of the Modern Public Health Campaign* (Journal of Public Health Policy ed. 1984) (1923) 7, 10

INTEREST OF AMICUS CURIAE

Madison County, New York is largely rural. Part of the county has generally level to gently rolling topography while the rest consists of rounded hills and steep-sided valleys. Its area is 661 square miles, with a population of 69,441 at the time of the 2000 census. Most residents work in the nearby cities of Syracuse and Utica, although the county has nearly seven hundred active farms. The county has one city, fifteen towns and ten villages. Madison County is home to several industrial facilities, banking and other commercial institutions, four colleges, numerous small business, and agricultural enterprises.

Madison County's comprehensive solid waste management plan, which is similar to that of Oneida and Herkimer Counties, is an example of a modern local government that properly manages all of the solid waste generated within it. Madison County, as a state-designated planning unit, operates its landfill and four transfer stations, materials recycling facility, yard waste composting facility, household hazardous waste program, television and computer recycling, sharps disposal and other programs pursuant to its NYS-approved Solid Waste Management Plan. As part of its integrated system, the County adopted a flow control law in 2001, similar to Oneida and Herkimer's, which directs all locally-generated municipal solid waste and recyclables to its transfer stations, landfill and recycling center.

Madison County's interest in this litigation is clear. For many years the County, witnessed and endured many of the same problems as Oneida and Herkimer counties: poorly managed local municipal dumps resulting in significant environmental and legal problems, and private operators in a market lacking competition holding municipalities hostage to ever increasing costs. Like Oneida and Herkimer counties, Madison County stepped into the breach to ensure that its residents' waste was properly disposed of, recycled to the

greatest extent possible, at a reasonable cost. Thus, like OHSWMA, it represents local government taking responsibility for ensuring the health and welfare of its citizens by properly managing solid waste pursuant to a system that includes flow control as an important element.

Madison County proffers this brief discussing the history of solid waste management in the United States in order to assist the Court in analyzing this case in the proper historical context, recognizing that solid waste management was and continues to be a core governmental function and that communities must be free to develop a system uniquely suited to their particular situation.

SUMMARY OF ARGUMENT

The Second Circuit Court of Appeals correctly decided that by local governments establishing themselves as the exclusive provider of solid waste disposal services within their jurisdiction, they are not in violation of the dormant commerce clause. The purpose of this brief is to place in historical perspective the role of local governments in the management of solid waste. Waste disposal has been and is a service that has traditionally been provided by local government and has been essential in protecting public health and welfare. Every major advance in the science and technology of waste management has come from the active involvement of local governments, confirming that a strong municipal role is vital to the solution of the current and future garbage crises. The Respondents in this case are correct, that for many communities to carry out their commitment to innovation in waste management, enactment and implementation of flow control regulations or conditional regulations in private contracts are essential.

ARGUMENT[2]

The purpose of this brief is to place current issues in the management of solid waste in historical perspective. Basically, there is nothing new about the role of local governments in handling such waste. Throughout American history, local governments have had the primary responsibility for the removal, processing and disposal of solid waste. Martin Melosi, a leading historian of American solid waste collection has stated, "The question of municipal responsibility for collection and disposal has long been resolved."[3] The Second Circuit spoke in the first *United Haulers* case of the "well-settled principle that waste disposal is a traditional local government function."[4] Like police and fire protection, parks and public schools, the collection of garbage and its disposal has been a core function of local government; a function inherent in the state police power to provide for the health and welfare of its residents. The chief contemporary reason for the exercise of this power by municipal authorities is to protect the environment.

Today, some counties, cities and towns directly collect, process and dispose of the solid waste themselves. Other cities and towns award exclusive or non-exclusive franchises to handle part or all of these functions while incidentally regulating the private waste-service sector. There is nothing new about this. Today, as during much of the Nineteenth Century and the entire Twentieth Century, citizens of cities and counties expect that their government will in some way provide for collection

---

2. This brief was co-authored with Shari G. Newman, a 2006 graduate of Touro Law School. The authors acknowledge the assistance of Benjamin Miller, former director of policy planning for the New York City Department of Sanitation and advisor in environmental policy to many organizations.

3. Martin V. Melosi, *Garbage in the Cities: Refuse, Reform and the Environment, 1880-1980*, at 194 (1981 ed.).

4. *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245, 263 (2d Cir. 2001).

services and for processing and disposal facilities, just as they expect government to provide other essential services. In spite of a growing state, federal and private presence, municipal control of sanitary services has not been seriously eroded.[5] Surely, in an area that evokes such great public concern, it is essential that each community have the ability to establish a system that best serves its needs.

This is not to say that responsibility for solid waste is exclusively municipal. In addition to cities, counties, and private firms, state governments play a role, and so does the federal government, a role most recently articulated in the Resource Conservation and Recovery Act of 1976 and its subsequent amendments. The RCRA: redefined solid waste to include hazardous waste and ordered EPA to require "cradle to grave" tracking of hazardous waste and controls on hazardous waste facilities; closed most dumps and set minimum standards for waste disposal facilities—including criteria for facility sizes and locations—through rules and regulations promulgated through the states.[6]

THE PRE-CONSTITUTION ERA

The history of solid waste collection and disposal is intertwined with the history of the city.[7] Prior to 1787, the United

5. Melosi , *supra*, at 238.

6. Melosi [2005 ed.], at 203.

7. Sanitation tends to become a problem when there is population density. When human beings first gathered together in settlement, they had to establish places at the edge of their settlement to dispose of garbage. As early as 2500 B.C., the city of Mahego-doro in India possessed elaborate drainage systems as well as rubbish chutes in the homes of its residents. The city of Babylon had drains, cesspools and sewage systems, while Crete set aside areas for the disposal of human waste around the year 1500 B.C. The Greeks had the world's first municipal dump in 500 B.C., while Rome had sewers, great aqueducts and public latrines. Virtually all of the early civilizations protected food

(Cont'd)

States had few cities, and the entities classified as cities were very small (8,000 or more).[8] Solid waste problems tend to emerge when cities reach a certain level of population density. So long as there was unsettled land outside but near the city, garbage could be disposed of by individuals at the nearest convenient place without governmental activity. It was the growth of urban centers that made necessary elaborate and complex systems to handle solid waste.[9] As time proceeded, governments adapted environmentally-protective systems and requirements originally created for use by cities to all areas of the country, recognizing that public health and safety is necessary even in the most rural and seemingly isolated locations.

In the Seventeenth and Eighteenth Centuries, public health knowledge had advanced little from the Middle Ages. It would take more than a century before a critical mass of scientific studies presented a generally adequate picture of the causes of disease. Although there was very little "hard knowledge" about public health, cities nevertheless worried about a connection between unsanitary conditions and public health. By the end of the Seventeenth Century, several colonial towns had reached a stage in their development requiring them to pass basic sanitary laws. A 1652 Boston ordinance dealt with the construction of privies. In the Seventeenth Century, Boston regulated trades such as butchers and blubber boilers who fouled the environment and issued an ordinance dealing with garbage removal.[10]

(Cont'd)

and water from contamination. The Minoans had flush toilets. E. S. Savas, *The Organization and Efficiency of Solid Waste Collection* 11 (1977); John Duffy, *The Sanitarians: A History of American Public Health* 5-6 (1990).

8. Richard B. Morris & Jeffrey B. Morris, *Encyclopedia of American History* 631 (1996).

9. Savas, *supra*, at 11.

10. *Id.* at 16.

During the colonial era, municipal governments relied on the initiative of individual householders or businesses to manage their own wastes by sweeping up the organic and inorganic detritus from in front of their houses or places of business. At their best, streets were paved with cobblestones whose interstices usually became packed with accumulations of organic material and other debris that was impossible to remove by rinsing or sweeping. Unless it could be eaten by animals or used to fertilize crops, refuse was removed to low-lying lots or dumped in the nearest body of water.

As such conditions became intolerable, municipalities began to take responsibility for waste. The first was Boston, which in 1666-67 appointed a municipal scavenger. Scavengers, who become a standard feature of municipal life in the United States, were responsible for sweeping the streets, clearing them of animal carcasses, piles of kitchen waste and other refuse that might impede traffic or otherwise cause a nuisance.[11] While New York City did not appoint a scavenger until 1750, when cart men asked for a monopoly for transporting goods within New York City in 1670, the city made a condition that the cart men remove piles of dirt, rubbish and garbage from the streets every Saturday.[12]

FROM THE ERA OF THE CONSTITUTIONAL CONVENTION TO THE FIRST CHOLERA EPIDEMIC (1787-1832)

During the four decades between the commencement of government under the U.S. Constitution and the first great cholera epidemic to reach the United States, the American population grew rapidly, especially in its cities. In 1790, 5.1% of the population of the United States was city dwellers; in 1840, the figure would be 10.8%.[13] The great migration west led to

11. Duffy, *supra*, at 13, 28.

12. *Id.* at 16.

13. Melosi, *supra*, at 13.

the settlement of a number of smaller cities comparable or greater in population by 1832 to that of the Eastern cities in 1790. Furthermore, the cities had to cope with the profound dislocations caused by the Industrial Revolution—long hours and dangerous conditions in the factory and life in crowded tenements.

Throughout the colonial period, responsibility for street cleaning had been able to rest primarily in the hands of individual citizens.[14] But, by 1832, the chronic overcrowding in the Eastern cities made that no longer possible. Existing sewer disposal systems failed to meet the needs of the growing cities. Water was impure; unpaved streets reeked with waste.[15] The problem was accentuated by waste coming from tanning, slaughtering and other businesses. Furthermore, humans lived with and among domestic animals and their refuse was everywhere.[16] As a result, wave upon wave of communicable diseases spread—typhoid and yellow fever, small pox, cholera and childhood diseases such as diphtheria. Boards of Health had been created in some cities to deal with such matters, but neither laymen nor physicians had command of what would become fundamental principles of public health.[17]

The onslaught of yellow fever proved to be the first major impetus to the movement for sanitary reform. The first yellow fever epidemic to reach the United States hit Philadelphia in 1793. Perhaps one-tenth of the population of that city perished. Yellow fever would return again the following year and spread to other cities.

---

14. Duffy, *supra*, at 16.

15. Melosi, *supra*, at 14. See also Savas, *supra*, at 17.

16. Duffy, *supra*, at 13, 30, 88; Ernest S. Griffith & Charles R. Adrian, *A History of American City Government: The Formation of Traditions, 1775-1870*, at 66 (1938).

17. C.F.A. Winslow, *The Evolution and Significance of the Modern Public Health Campaign* 6 (1923, repr. 1984).

In New York City, a committee of the City Council placed the blame for the epidemic virtually on every sanitary problem of the day: foul-smelling slips, undrained lots, overflowing sinks and privies, burials within the city during the hot season (when, actually, the disease was mosquito-borne). The committee urged the municipality to plan for a waste system and build underground sewers, and in the meantime to hire carts and laborers for street cleaning and assume full responsibility for it. What the Council did do was to draft a bill, which was passed by legislature, which gave the municipal government full control over sanitary matters.[18] Elsewhere, town after town began major efforts to drain pools, clear drains of carrion, require residents to empty their overflowing privies.[19]

Yellow fever would recede from the North in the middle of the first decade of the Nineteenth Century, and no new great pestilence would threaten for over twenty-five years. As a result, governmental efforts to promote the public health and welfare were sharply reduced. With but a few exceptions, health boards disappeared.

Nevertheless, by 1830, nearly all major American cities had taken some responsibility for cleaning their streets. Individual residents were expected to sweep the dust in front of their homes or business establishments, but scavengers or cart men employed by the city, private contractors or even local farmers collected the material they had swept up. Further, by 1830, most of the larger towns regulated the construction, location and emptying of privies. Progress was made in securing healthful water, creating sewer systems and even in building regulations. Unfortunately, the effect of most of these accomplishments was nullified by rapid population growth.[20]

---

18. Duffy, *supra*, at 43; Edwin G. Burrows & Mike Wallace, *Gotham: A History of New York City to 1898*, at p. 43 (1999).

19. Duffy, *supra*, at 48.

20. *Id.* at 72. 73, 77; Griffith& Adrian, *supra*, at 152.

9

FROM THE FIRST CHOLERA EPIDEMIC TO THE END OF THE AMERICAN CIVIL WAR (1832-65)

As rapid growth of the nation's cities continued—between 1830 and 1860 the percentage of Americans living in cities of 10,000 more than doubled[21]— municipal governance had to come to terms with the problems this growth caused. Municipal responsibilities increased and a bureaucracy slowly began to develop. City services were established to deal with pressing needs.

The scourge of cholera and developments in public health knowledge led to increasing concern about solid waste. When the first of three cholera epidemics hit the United States in 1832, municipal responsibility for the removal of waste and for public health was still in an immature state. The streets of the nation's largest cities were filled with the giant heaps of excrement of men and animals, decaying garbage, putrefying carrion and stagnant pools in every low place. The markets were strewn with the heads of sheep, the hoofs of cattle, blood and offal, as well as dead dogs, cats, hogs and rats.[22]

While there was hardly any scientific knowledge of disease to be drawn upon, American cities still had to act to try to protect their residents. Towns and villages appointed boards of health. In almost every American city, sanitary surveys and reports were commissioned. Filth continued to be blamed for the epidemics. The reports recommended the building of water and sewer systems, the institution of street cleaning and garbage collection, the creation of strong health departments with extensive authority and the passage of sanitary measures that included among other things, the removal of waste from streets and

21. Bureau of the Census, U.S. Department of Commerce, *Historical Statistics of the United States, Colonial Times to 1970*, Part 2, at 11-12.

22. Griffith & Adrian, *supra*, at 69; Burrows & Wallace, *supra*, at 588, 787; Benjamin Miller, *Fat of the Land: Garbage in New York The Last 200 Years* 37 (2000); Duffy, *supra*, at 88.

private property.[23] While these recommendations would clearly contribute to improved public health and general public betterment, they would not by themselves eliminate cholera, typhoid fever, tuberculosis or the other great scourges.

Thus, as a result of the epidemics, municipal governments acted more assertively in dealing with sanitary problems. In certain localities, more comprehensive regulations to control the removal and disposal of waste materials were promulgated. As early as 1832, New York's Board of Health assumed many of the functions of Twentieth Century government– running hospitals and welfare services, providing for slum clearance, controlling the sale of food and drugs.[24] Streets and homes were cleared and "purified". In New York, 20,000 of its wandering hogs, long a problem, were driven to the City's Northern wards during the 1849 outbreak. By the beginning of the Civil War, New York's porkers were in exile north of 86th Street.[25]

Spurred by the need to respond to the periodic epidemics; aided by the emergence of vital statistics as a public health tool which demonstrated that dirt, congestion and bad air shortened lives; sensitized to the danger of poor drainage, foul water and crowded tenements; concerned about sewage, offal and dead animals; encouraged by the increasing role of medical societies in promoting public health, the stage was set in the large cities for greater municipal responsibility for street cleaning, garbage collection and pure water supply.[26] By the end of this period, there would be firmer institutional entrenchment of local governmental control in the management of sanitary affairs.

---

23. Duffy, *supra*, at 81, 99-100; Griffith & Adrian, *supra*, at 67; Rosenberg, *supra*, at 19; Ernest S. Griffith, *A History of American City Government: The Progressive Years, and Their Aftermath* 192ff (1974).

24. Rosenberg, *supra*, at 83.

25. Burrows & Wallace, *supra*, at 786. .

26. Griffith & Adrian, *supra*, at 8; Rosenberg, *supra*, at 143; Duffy, *supra*, at 67, 93; Winslow, *supra*, at 25ff.

FROM THE LAST CHOLERA EPIDEMIC TO THE BEGINNING OF THE "GOLDEN AGE OF PUBLIC HEALTH" (1866-1894)

The thirty-year period that followed the American Civil War was notable for remarkable developments in public health and for extraordinary breakthroughs in the understanding of disease. As the work of municipal governments increased greatly in complexity, they took on greater responsibilities for the removal of solid waste.

The lessons of the great wars of the era contributed to the growing involvement of the cities in waste collection and removal. The Crimean and the American Civil War produced considerable knowledge about the connection between uncleanliness and disease. The sanitary techniques pioneered by Florence Nightingale and others would come to be employed in civilian life by the same sanitary engineers who had applied them in the military camps. When such officers as General Egbert Ludovicus Viele and Colonel George E. Waring, Jr. returned to civilian life, they came to play an increased role in municipal management of liquid and solid waste.

Rising interest in the whole area of public health was stimulated by reports and surveys of public health conditions. New organizations were formed, such as the American Public Health Association (1872) that helped professionalize the field and produced seminal reports on conditions in America.[27]

Growing municipal interest in waste removal was also stimulated by revolutionary change in the field of medicine, where there were major advances in pathology, histology, physiology and chemistry. The 1880s was the decade that saw the identification of the organisms responsible for many killer diseases. The first wide-scale application of bacteriology to public health occurred with regard to diphtheria.

---

27. Ernest S. Griffith, *A History of American City Government: The Conspicuous Failure, 1870-1900*, at 53 (1983) (1938).

During this period, for the first time there was hard evidence that garbage was not only an aesthetic problem, but also one that greatly impacted public health. Typhoid fever, dysentery, pneumonia and tuberculosis were the normal hazards of tenement life. The need to make improvements in the collection of solid waste was identified as a critical component in the fight against those and other diseases.

The last twenty years of the Nineteenth Century saw the sanitary revolution in full swing. Towns and cities were establishing water and sewer systems, while health departments were expanding into new areas such as laboratory testing of water and milk.[28] Taken together, these advances—inspection, pasteurization, vaccination and immunization, attacks on mosquito-borne diseases and public education—led to a remarkable improvement in public health.

During the thirty years following the Civil War, municipal governments increasingly exercised their police powers and made assertive use of them. By 1870, virtually all of the modern municipal services had been established, at least at a rudimentary level, and were being operated in the large and middle-sized cities by full-time personnel. The larger cities had fire departments, salaried police and municipally sponsored schools.

One of the most striking features of the decades immediately after the Civil War was the growth in the number and effectiveness of municipal health departments. Among the most important developments was passage by the New York State Legislature of a law creating a Metropolitan Sanitary District (encompassing much of the yet unconsolidated New York City) and a Metropolitan Board of Health that was given substantial legislative and quasi-judicial powers. Within eight months of the Metropolitan Board of Health's creation in February 1866, 160,000 tons of manure were removed from vacant lots, 31,000 cease and desist orders issued, 4,000 lots ordered cleaned and 6,418 privies disinfected. In 1866, New York City suffered

28. Duffy, *supra*, at 125-26.

only one-tenth the number of deaths caused by cholera as compared with 1849. The Metropolitan Board of Health would prove to be the first effective health department in a major city and would become a model for urban health departments throughout the nation. Its work would demonstrate that disease was preventable through proper management of municipal solid waste and improved sanitation practices.[29]

The public health functions of municipalities varied. They could include tenement inspection, the collection of statistics, quarantining, water treatment, removing nuisances associated with foul odors and running the city's small pox hospitals and insane asylum.[30] The sanitary revolution in America was in full swing and health and sanitation were virtually synonymous. Elaborate water supply systems were constructed. Old sewer lines were expanded and new ones built. Most heavily-traveled streets were paved. The collection of garbage and refuse was improved and new facilities for the disposal of garbage provided.[31]

The United States Census first collected information on the management of municipal solid waste in 1880. Of the 199 cities surveyed, 68.8% directly managed waste removal and disposal services—either through private contracts, the use of public facilities and personnel, or through some combination thereof. Because a reliance on individual initiative became increasingly impractical as population density increased, the provision of waste management and disposal services by the public sector was particularly prevalent in the larger cities. In 1880, only 21% of cities with a population of at least 30,000 did not provide these services in one form or another.[32]

---

29. Rosenberg, *supra*, at 210, 212, 239; Duffy, *supra*, at 118ff.

30. Griffith, *A History of American City Government: The Conspicuous Failure*, *supra* at 8ff; Duffy, *supra*, at 142-43,

31. Griffin & Àdrian, *supra*, at 224; Loren P. Beth, *The Development of the American Constitution 1877-1917*, p. 101.

32. Melosi, *supra*, at 31.

Of the cities surveyed in the 1880 census, 94% had a board of health commissioner or a health officer. Of those, 46% had some direct control over the collection and disposal of refuse.[33] That year, only 24% of those services were actually run by a city. The figures jumped to 65% in 1900.[34] By the turn of the century, a growing number of cities provided at least a rudimentary level of solid waste collection and disposal.[35]

Cities and towns were also concerned with what was done with the collected garbage, although they lacked modern sensitivity to environmental concerns. In many towns, refuse was dumped onto vacant lots. When the town grew, the refuse was consolidated at convenient points on low ground or on roads needing grading. Cities on the seaboard or on rivers that could conveniently do so dumped waste into waterways. Many New England cities and towns sold their swill to farmers. Several western cities also sold their garbage.[36]

By the end of this period, cities were responsible for sanitation and public health, as they were for elections, fire prevention and fire fighting, prevention and punishment of crime, education and the building and maintenance of roads and parks.[37] With considerable progress made in some cities with the provision of fresh water and construction of an adequate sewage system, the refuse problem finally captured the attention of urban dwellers. Sanitarians and public health officers offered health reasons for their concern; civil groups offered aesthetic reasons for improvement in collection and disposal; engineers provided new technologies.[38] Certainly, more needed to be done

---

33. Savas, *supra* at 2, 7.

34. Melosi (2005 ed.) 155.

35. Blumberg & Gottlieb, *War on Waste* 6 (1989).

36. William Francis Morse, *The Collection and Disposal of Municipal Waste* 2, 6, 48, 85, 328, 330, 364, 371(1908).

37. Beth, *supra*, at 93, 101.

38. Melosi, *supra*, at 49-50.

—especially with the disposal of municipal solid waste—but the cities were more engaged in the process in the late 19th Century.

By the 1890s, in some places the quality of urban life had really improved. In Memphis, for example, as late as 1879, the water supply had been polluted with excrement. Yards, alleys and gutters had been full of garbage, refuse, stagnant water and dead animals.[39] However, beginning around 1880 under the leadership of George E. Waring, Jr., sewer and water systems were improved and animals driven from newly paved streets. By 1890, Memphis had been transformed into one of the nation's cleanest cities. Its mortality rate had been cut in half over seventeen years.[40] This much could be said: as the Nineteenth Century drew to a close, the sanitary movement had finally begun to improve the quality of human life.

FROM NEW YORK CITY'S REFORMS TO THE NEW DEAL (1895-1932)

The last decade of the Nineteenth Century and first decade of the Twentieth may be properly called "the golden age of public health". It was during these years that the water-borne diseases (cholera, typhoid) and the insect-borne maladies (yellow fever, malaria) were conquered in the Northern Hemisphere. Considerable progress was made against other public health menaces. Increasingly, public health reformers linked sanitary practices to the incidence of disease and health risks in urban areas. Between 1900 and 1930, the life expectancy for the average American increased from 47.3 years to 59.7.[41]

The flagship of reform for municipal handling of solid waste was New York City. It was jump-started in 1895 by the

---

39. Griffith, *A History of American City Government: The Conspicuous Failure*, *supra*, at 41.

40. Duffy, supra, at 143-45.

41. Duffy, *supra*, at 256.

appointment of George E. Waring, Jr. as Street Cleaning Commissioner, heading a department previously notorious for inefficiency and corruption. With Waring's appointment, the first practical, comprehensive system of refuse management in the United States was created. Waring's force was professionalized and organized in a military fashion. His uniformed "white wings" scoured the streets, arrested violators of the Sanitary Code, cut ocean dumping to a minimum and became nationally famous for efficiency and morale.[42]

In addition to keeping the streets clean, Waring devised a program for efficient source separation, collection and disposal of municipal solid waste that involved local communities and individual citizens. Waring's experiments when he was Street Cleaning Commissioner of New York were the first efforts made in the United States to systematize the collection and disposal of municipal waste. He employed a precursor of recycling that he had seen in Budapest: sorting waste by placing thin layers on a moving belt, where workers, standing on either side, picked out materials with market value or which could be put to a useful purpose providing revenue for the city.

Waring embodied the principle that, to achieve success in waste management, public welfare needed to take priority over private economic interests. Waring's waste management strategies embedded the notion that sanitation was a municipal responsibility.

By 1905, sanitary engineers and public health officers emerged as even more crucial "players" than before. Joined with other reformers, they demanded the termination or alteration of contracted collection and disposal (because of their susceptibility to corruption) and supported centralization of refuse

---

42. Griffith, *A History of American City Government: The Conspicuous Failure*, supra, at 4, 52; Duffy, *supra*, at 175; Burrows & Wallace, *supra*, at 1194-96; Frank G. Goodnow, *City Government in the United States*, 239-40 (1991 repr.) (1904).

management through municipal departments operating under the newest management techniques.[43]

For decades, professional engineers, public health officials, and civic reformers had strongly supported purely municipal operations, believing that sanitation was an inherently public responsibility that should be managed as a public utility. From the 1890s to the outbreak of the First World War, direct municipal provision of waste services (using municipally owned disposal facilities and municipal collection workers) increased substantially. Surveys conducted from the 1880s to the end of this period demonstrate increased municipal responsibility for direct collection of solid waste, street cleaning and disposal. In 1880, 24% of the municipalities surveyed took complete responsibility for collection and disposal while another 19% contracted out the service. In a 1902 survey of 161 cities, ranging in population from 28,000 to New York City's millions, 33.5% took complete responsibility and 30% contracted out their service. In a 1915 survey of 168 cities, 50% of the cities had municipally controlled collection service. Of the 96 cities surveyed in 1924, 63% had direct municipal collection.[44] Thus, whatever the manner of disposal, the health factor, odors and nuisances had established collection as an appropriate municipal function.

Cities employed a wide variety of methods to dispose of garbage. The evolution of waste disposal practices from the primitive dumping on land or sea to the building of large-scale industrial plants, also contributed to making local government's role in the management of municipal waste more widespread. The demand for the safe and instant disposal of dangerous matter could be met by the erection of facilities in which excrement, garbage, dead animals and combustible refuse were incinerated. In 1885, the first American incinerator was built. The first

43. Melosi, *supra*, at 80, 87ff, 113; Griffith & Adrian, *supra*, at 8.

44. Melosi, *supra*, at 28, 30, 98-100, 106-07, 113-16, 137, 139, 153-4, 197; Blumberg & Gottlieb, *supra*, at 8ff.

generation of incinerators was not successful. Of 180 incinerators built between 1885 and 1908, 102 had been abandoned by 1909. A second generation was built after 1910 and, more successful, achieved wider use.

Another important innovative method involved the technology of reduction through which it was possible to extract oils and other by-products through the compression of city garbage. The byproducts could be sold as lubricants, perfume base and fertilizer. Reduction, however, was unable to dispose of the inorganic elements of the waste stream. Few reduction plants remained in operation after the First World War.[45]

Reduction plants, like incinerators, were capital-intensive, "high technology" facilities. Both required waste management conducted on such a large scale. Only a government entity—or a contractor to a government entity—could muster the financial and technical resources required.

The widespread pattern of municipal provision of sanitation services in one form or another continued and similar ways of dealing with it emerged again and again: different generations of incinerators, waste-to-energy plants, recycling. Engineers became aware that in order for waste management programs to be productive, not only were large financial investments necessary, but specific, complex, detailed planning was necessary to account for the differences of each municipality. As a result, existing contract arrangements were modified to incorporate meticulous and necessary advances in waste management practices because private contractors were not willing to incorporate systems that required large capital investment and were more interested in keeping costs low. [46]

---

45. Melosi, *supra*, at 49, 152, 175; Blumberg & Gottlieb, *supra*, at 8ff.

46. Peter T. White, *The Fascinating World of Trash*, 163 Nat'l Geographic, April 1983, at 424, 456.

The post-war period brought new challenges. The progress between 1880 and 1920 had been limited to waste elimination. Much less thought was given to waste generation. By one estimate, the solid waste generated after the First World War increased five times as rapidly as the population. Between 1900 and 1920, each citizen of Manhattan, Brooklyn and the Bronx annually produced 50 to 100 pounds of rubbish, 160 pounds of garbage and 1231 pounds of ashes.[47] This would prove to be a more intractable problem. The automobile and chemical industries brought forth new collection and disposal products problems in the 1920s as did the unprecedented growth of packaging materials–paper goods, plastics, glass, aluminum, as well as toxic chemicals and synthetics.[48] While sanitary engineers had been able to solve the problems of municipal sewage and waterworks with advanced technology, they recognized that proper handling and disposal of solid waste required less knowledge of technology and more of human nature. The municipalities had to teach their residents how to consume less.

FROM THE NEW DEAL ERA TO THE CREATION OF THE ENVIRONMENTAL PROTECTION AGENCY (1933-70)

The growing trend towards municipalities taking complete responsibility for solid waste continued steadily in the 1920s and 1930s. Direct municipal collection predominated, but some municipalities instead used some form of contracts or franchise agreements. By the late 1930s virtually every city with a population exceeding 100,000 offered or contracted for collection and disposal services. In 1939, 78% of the 190 cities surveyed were directly responsible for collection and disposal.[49]

---

47. Melosi, *supra*, at 23.

48. *Id.* at 190.

49. Melosi, *supra*, at 197, 206; Blumberg & Gottlieb, *supra*, at 6; Savas, *supra*, at 36-7..

During this period the Supreme Court upheld the exercise of state police powers against Commerce Clause challenge in two significant cases. In *Clason v. Indiana*, 306 U.S. 439 (1939), the Court upheld a state law requiring transportation of waste under strict sanitary conditions by a licensed operator. The Supreme Court held that the mere power of the federal government to regulate interstate commerce did not prevent the states from adopting measures designed to secure the health and comfort of their people.

In *Parker v. Brown*, 317 U.S. 341, 367 (1943), the Court upheld an antitrust exemption for state and local regulation. The Court recognized a wide scope for local regulation without substantially impairing the national interest in the regulation of commerce, so long as the free flow of commerce was not materially obstructed.

After the Second World War, the further growth of the package industry led to a jump in the volume of municipal solid waste, as did the planned obsolescence of durable goods. Waste generation, thus, had become an essential by-product of economic activities.[50]

The first "sanitary landfills" had been established in New York City and Fresno in the 1930s. After the War, the sanitary landfill became a preferred alternative to open dumping. The rise of sanitary landfills also roughly coincided with the decline of incineration that began during the 1940s and the 1950s.[51]

The widespread pattern of municipal provision of sanitation services in one form or another continued after 1960.[52] There was a growing trend back toward private contracting. New environmental laws and regulations concerning landfills and incinerators resulted in the closure of relatively small-scale, non-

---

50. Blumberg & Gottlieb, *supra*, at xv, 11ff.

51. *Id.* at 17.

52. Melosi, *supra*, at 198.

compliant facilities owned by local governments. They were replaced by a much smaller number of much larger, regulatory compliant landfills (and a handful of incinerators), many owned by private sector firms.

During the 1960s, conglomerates began controlling a substantial portion of the residential as well as the commercial collection business. Through aggressive pricing and other marketing techniques, a relatively small number of firms and disposal facilities were able to secure contracts for the collection and disposal of a significant portion of the nation's waste, generally under detailed contracts with local governments. The widespread consolidation in the private waste industry resulted in a handful of large, vertically integrated, multi-national firms in place of hundreds of smaller, locally-based firms. The fiscal difficulties of many local governments contributed to the trend. Cities and counties sought to avoid upfront capital costs through the resort to private disposal facilities and the lower ongoing operational costs that were associated with private collection contracts. Although exclusive municipal collection declined, 65% of American cities maintained some degree of municipal control.[53]

Complete reliance on landfills diminished as they filled or failed to meet new standards. Communities began to look for other alternatives.[54] During the 1960s with increased regulation, additional permitting requirements and stepped-up monitoring of pollution, responsibility for the various aspects of collection became fragmented among many agencies, councils and other groups. Passage of the Solid Waste Disposal Act by the Congress in 1965 required no immediate changes, but brought attention to the problem of solid waste on a national scale. The federal government was authorized to grant financial incentives to state and local government for research, training

53. Melosi, *supra*, at 197.

54. *Id.* at 190, 197, 199ff, 202; Blumberg & Gottlieb, *supra* at 128.

and local demonstration programs. A product of the Act was the understanding that garbage was a problem extending beyond city limits. Inter-local, county-wide and multi-county arrangements began to make municipal boundaries less meaningful.

THE ERA OF GREAT ENVIRONMENTAL CONCERNS (1970-TO DATE)

By the 1970s, the solid waste problem was national. It had become apparent that federal and state funding were essential to any successful waste management system. In 1976, Congress passed the Resource Conservation Recovery Act (RCRA, 42 U.S.C. §6901, *et seq.*) that focused primarily on the need to change from disposal to recycling, resource recovery, and the conversion of waste to energy. RCRA established a comprehensive framework for managing hazardous and non-hazardous waste in an environmentally sound manner, including the requirement to properly handle and dispose of hazardous waste from cradle to grave. The EPA was made responsible for most national solid waste management activities.[55] But a state and local partnership was encouraged, pursuant to a system of State solid waste plans, 42 U.S.C. §6943.

Towards the end of the 1970s, there were growing health and environmental concerns about landfills. While the problem of contamination of ground water resulting from leaking landfills had begun to be recognized in the early and mid-1970s, it took a few years before such conditions were given widespread publicity.[56] RCRA started to address this growing concern by

55. Prior to 1970, enforcement of the 1965 Waste Disposal Act had been the responsibility of the United States Public Health Services (USPHS) and the Bureau of Mines (BOM). The USPHS was responsible for municipal waste and BOM supervised mining and fossil fuel waste from power plants and industrial steam plants. When EPA was created, the activities were combined and the responsibilities of overseeing solid waste management activities transferred to EPA. Melosi, *supra*, at 201.

56. Blumberg & Gottlieb, *supra*, at 130.

requiring the EPA to develop criteria for classifying open dumps and sanitary landfills, which during the next two decades ultimately led to the closure of thousands of unlined dumps throughout the country, RCRA, at §6945.

Modern environmental awareness, better scientific capacity to identify threats to public health, and technical innovation have eliminated any complacency about the consequences of disposal that rural communities, such as Madison County might have once enjoyed. While traditional sanitation concerns arose in the nation's cities, with immediate danger from disease and congestion, the modern era has revealed the threat posed to air and groundwater by solid waste in every region. The response to these threats in rural communities, like their urban neighbors, must still come from local government. Technical and organizational advances now make it possible to build safer, although far more expensive, facilities to recycle, compost and landfill solid waste, as Madison County has done. In Madison County, as in New York City and other large population centers, public participation remains extremely important, as local governments strive to implement waste systems that reflect the environmental standards demanded by the public. Today, governmental accountability for the state of waste management is as vital as ever. Therefore, it is important that the court affirm the decision of the Second Circuit, in order to confirm that local government can continue to provide the traditional leadership it has always provided in the field.

Amicus curiae Madison County, in response to concerns from county residents and businesses that were seeing their local dumps shutting down, addressed this need for improved environmental infrastructure by developing a county-owned and operated solid waste management system in the mid 1970's. It included four solid waste transfer stations, recycling drop-off facilities, and a central landfill for use by county residents, businesses and haulers. Madison County has continued to expand and upgrade these solid waste management facilities

over the years, ever mindful of the importance of providing economical and environmentally sound solid waste management services for the community.

Soaring energy prices in the late 1970's and early 1980's, along with RCRA's emphasis on resource recovery, also helped spur the development of waste-to-energy facilities in many communities as a solution to the garbage crisis. These waste-to-energy projects were typically implemented through public-private partnerships. Under such partnerships the local government typically paid a negotiated service fee to the waste-to-energy facility owner/operator covering debt repayments and the cost of disposal. In return, the private owner/operator guaranteed to operate the facility at specified performance levels and share the energy revenues through a negotiated formula.[57]

New York State encouraged the development of waste-to-energy projects by providing grant assistance from a 1976 Environmental Quality Bond Act and by establishing more flexible public procurement rules (NYS General Municipal Law Section 120-ww, adopted in 1980) that facilitated the negotiation of more complex development contracts that were involved with such public-private partnership arrangements.

In 1980 Congress adopted the Comprehensive Environmental Response, Compensation and Recovery Act (CERCLA, also known as Superfund, 42 U.S.C. §9601 *et seq*). CERCLA established a funding mechanism and environmental standards that authorized EPA to take action to clean up abandoned or uncontrolled hazardous waste sites that pose a threat to public health or the environment. CERCLA also imposed strict liability upon those deemed responsible for the release of hazardous substances from such sites. A portion of this clean-up liability even extended to municipalities, businesses, haulers and waste generators who had only sent non-hazardous waste to what eventually became identified as a Superfund site. CERCLA made it clear that the consequences

57. *Id.*, at 38.

of improper waste disposal could be severe — to public health, to the environment and to the financial balance sheet.

In New York State, the Solid Waste Management Act of 1988 (1988 Act) established requirements for local government planning units to prepare long term (a minimum ten-year planning period) solid waste management plans that would be consistent with a state-wide solid waste management hierarchy consisting of the following priorities: 1st—waste reduction, 2nd —recycling, 3rd—recovery of energy from waste and 4th— landfill disposal. The 1988 Act also required municipalities to adopt local laws or ordinances to mandate that recyclable materials be separated from waste, thereby spurring a substantial increase in recycling within New York State that continues to this day.

Madison County, like OHSWMA and other local government planning units throughout New York State, prepared a comprehensive long term solid waste management plan in accordance with the 1988 Act. The County's development of this long term plan not only involved considerable input from the community, including local haulers and recycling companies, but culminated with review and approval by the County's elected Board of Supervisors and by the New York State Department of Environmental Conservation. The County's long term plan calls for the county to continue to provide an environmentally sound, integrated system of solid waste management facilities for county residents, businesses and haulers that emphasizes waste reduction and recycling.

Today, like Respondent, Madison County provides a full array of recycling, waste reduction, household, hazardous waste, transfer, and landfill disposal services to its constituents. These services are paid for by system user (tipping) fees on waste, with no fees charged for recycling, thereby providing incentives to recycle more and to generate less waste for disposal. Within months of the Second Circuit's decision below, in 2001 Madison County also adopted a local flow control law that is substantially

similar to Respondent's, which enables it to secure waste disposal fees that are adequate to support its environmentally beneficial recycling and waste reduction programs, disposal of household hazardous waste, sharps, television and computer recycling, public education, and other programs.

In addition, the County currently has a permit application pending with the New York State Department of Environmental Conservation for a landfill expansion that is anticipated to provide environmentally sound solid waste disposal capacity for over one hundred years. Flow control assures steady tipping fee revenues which are critical to Madison County's environmentally sound solid waste management programs.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

JEFFREY B. MORRIS
Counsel of Record
TOURO LAW SCHOOL
300 Nassau Road
Huntington, NY 11743
(718) 428-3507

S. JOHN CAMPANIE
County Attorney
Madison County
North Court Street
P.O. Box 635
Wampsville, NY 13163

MICHEL J. DEBOTTIS
Madison County
Solid Waste and Recycling
Committee Chairman
230 Main Street
Oneida, NY 13421

Counsel for Amicus Curiae